Supreme Court, U. S.
FILED
MAR 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs-Appellees.

———Consolidated With———

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, et al.,
Plaintiffs-Appellees,

CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

MICHAEL E. LAVELLE,
100 N. LaSalle Street,
Chicago, Illinois 60602,

MICHAEL L. LEVINSON,
100 N. LaSalle Street,
Chicago, Illinois 60602,

FRANKLIN J. LUNDING, JR.,
100 N. LaSalle Street,
Chicago, Illinois 60602,

Attorneys for Appellant
Illinois State Board of Elections.

Keenan Printing Company 312-648-0050 365

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 4

QUESTIONS PRESENTED 5

I.

Whether The Court Of Appeals Can Negate A State Statute Recently Held Constitutional By This Court In *Jackson* v. *Ogilvie*? 5

II.

Whether A Court Of Appeals Can Ignore The Principle Of Law Mandated By This Court In *Moore* v. *Ogilvie*, That The Passage Of An Election Does Not Render Moot Substantial Legal Questions Still Alive For All Future Elections? .. 5

STATEMENT OF THE CASE 6

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL 10

CONCLUSION 16

TABLE OF AUTHORITIES

PAGE

CASES

Briscoe v. *Kusper*, 435 F. 2d, 1046 (7th Cir. 1970) 10
Brown v. *Chote*, 411 U.S. 452, 93 S. Ct. 1732 (1973) ... 14
Jackson v. *Ogilvie*, 325 F. Supp. 864 (N.D. Ill. 1971) 5, 7, 10
Moore v. *Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 (1969) ..5, 13
Southern Pacific Terminal Co. v. *Interstate Commerce Comm.*, 219 U.S. 498, 31 S. Ct. 279 (1911) 15
Storer v. *Brown*, 415 U.S. 724, 94 S. Ct. 1274 (1973) .. 14
Williams v. *Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968) ... 11

CONSTITUTIONAL PROVISION

The Equal Protection Of The Laws Clause Of The Fourteenth Amendment To The United States Constitution 3

STATE STATUTES

Chap. 46 Illinois Revised Statutes, (Election Code)
§ 10-2 4
§ 10-3 4-5

TREATISES

Moore's Federal Practice:
V. 1B § 0.401 11
V. 1B § 0.404[1] 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.——

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,
vs.
SOCIALIST WORKERS PARTY, et al.,
Plaintiffs-Appellees.

——Consolidated With——

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,
vs.
GERALD ROSE, et al.,
Plaintiffs-Appellees,
CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, State Board of Elections, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the order entered by the Court of Appeals for the 7th Circuit in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion of the U. S. Court of Appeals for the 7th Circuit was decided December 9, 1977 (App. A, p. 1a).

The opinions of the United States District Court for the Northern District of Illinois, Eastern Division with the Honorable Bernard M. Decker, Judge presiding, were rendered March 14, 1977 (App. B, p. 7a) and April 6, 1977 (App. C, p. 33a).

An agreed order between appellee, Chicago Board of Election Commissioners and appellee, U. S. Labor Party, was signed March 17, 1977 (App. D, p. 39a).

JURISDICTION

This appeal arises from two actions filed by appellees in the United States District Court for the Northern District of Illinois, challenging, among other things, the constitutionality of Illinois law seting forth minimum signature requirements for nominating papers for new political parties and independent candidates.

In both actions, appellees claimed a violation of the First and Fourteenth Amendments of the United States Constitution. Both were actions in equity wherein appellees sought relief under 42 U.S.C. and 28 U.S.C. §§ 2201-2202.

On December 9, 1977, the United States Court of Appeals for the Seventh Circuit affirmed that portion of the District Court's order, which in effect held upon equal protection grounds, that the requirement of 25,000 signatures for state-wide independent and new party candidates must be the maximum number of signatures that can be lawfully required of local independent and new party candidates. Stated otherwise, when the 5% figure as applied to the total vote in the jurisdiction would exceed 25,000, then 25,000 signatures would suffice as the minimum figure for ballot access.

The Court of Appeals, on mootness grounds, declined to rule on the issue raised by appellant as to the authority of a local election administrative agency by agreed order with a local new political party, to lower the minimum signature requirement and to extend the filing deadline contrary to state law and the supervisory authority of appellant.

A timely notice of appeal was filed on January 5, 1978, with the Clerk of the United States Court of Appeals for the Seventh Circuit. Jurisdiction of this appeal is conferred on this Court, pursuant to 28 U.S.C. 1254(2).

In the event that this Court does not consider appeal the proper mode of review, the appellant respectfully requests that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari, pursuant to 28 U.S.C., § 2103.

STATUTES INVOLVED

"... Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the State Board of Elections a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. . . . if such new political party shall be formed for the entire State [the petition] shall be signed by not less than 25,000 qualified voters. . . . If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area. . . ." 46 Ill. Rev. Stats., § 10-2.

"Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; . . . Nominations for independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political

division, equaling not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political sub-division in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area. . . ." 45 Ill. Rev. Stat., § 10-3.

QUESTIONS PRESENTED

(1) Whether the Court of Appeals can negate a state statute recently held constitutional by this Court in *Jackson* v. *Ogilvie*?

(2) Whether a Court of Appeals can ignore the principle of law mandated by this Court in *Moore* v. *Ogilvie*, that the passage of an election does not render moot substantial legal questions still alive for all future elections?

STATEMENT OF THE CASE

Appellees commenced two separate actions in the United States District Court for the Northern District of Illinois to declare as unconstitutional, those provisions of §§ 10-2 and 10-3 of the Illinois Election Code, regarding the nominating petition minimum signature requirement for independent candidates and candidates of new political parties.[1] Jurisdiction was alleged under 28 U.S.C., §§ 1131, 1343, 2201, 2202 and the First and Fourteenth Amendment of the United States Constitution.

Both actions involved a special mayoral election in the City of Chicago scheduled for June 7, 1977.

In *Socialist Workers Party, et al.* v. *Chicago Board of Election Commissioners, et al.*, No. 77 C 255, the Socialist Workers Party and two voters supporting candidates of the Socialist Workers Party sued the Chicago Board of Election Commissioners and its members, the City Clerk of Chicago, and members and employees of the appellant, State Board of Elections.

1. The Appellees also challenged as unconstitutional, the statutory filing deadline for independent candidates and candidates of a new political party. The Trial Court did not rule on this question pending ". . . evidence adduced as to urgency and possible compelling state reason for setting the filing deadline. . . . (App. B, p. 31a). However, since the agreed order between appellees extended the filing period beyond the statutory period, notwithstanding the objections of appellant, this issue was never adjudicated.

In *Gerald Rose, et al.* v. *John Hanly, et al.*, No. 77 C 326, the United States Labor Party, a candidate of the United States Labor Party, and two voters supporting the candidates of the United States Labor Party, sued the Chicago Board of Election Commissioners. At the request of the Chicago Board of Election Commissioners, the appellant, State Board of Elections intervened in this action.

Without an evidentiary hearing, on March 14, 1977, the District Court, in a consolidated opinion, held that a minimum signature requirement in excess of 25,000 signatures ". . . cannot be the least drastic means of accomplishing the state's goals and must be found to unduly impinge the constitutional rights of independents, new political parties and their adherents fn. [16]." (App. B., p. 26a) The Trial Court, in the same opinion, issued a permanent injunction against the defendants.

On March 17, 1977, the District Court signed an agreed order reflecting an agreement between the defendant-appellee, U.S. Labor Party, to reduce the signatures for independent and new political party candidates below the 5% minimum, 39,937 (25,000 by virtue of the district court's March 14th order), to 20,000 signatures, and to extend the filing deadline from sixty-four days before the election (April 14, 1977) to fifty days before the election (April 18, 1977). (App. D, p. 39a) Appellant first learned of the agreed order at this hearing and vigorously objected to its entry.

On March 17, 1977, the appellant moved to vacate the March 14th order of permanent injunction on the grounds that it was issued in violation of Rule 65 of the Federal Rules of Civil Procedure. Appellant further argued that the decision in *Jackson* v. *Ogilvie*, 325 F. Supp. 864 (N.D. Ill. 1971), *aff'd* 403 U.S. 925 (1971), was binding on the

District Court in that the U. S. Supreme Court specifically upheld the legality of both the .5% minimum signature requirement in Illinois for independent and new political party candidates as well as the petition filing deadline of sixty-four days prior to election day.

On April 4, 1977, the State Board filed an Offer of Proof and another motion to vacate the order of permanent injunction set forth in the March 17th order, maintaining that it was incumbent upon the plaintiffs-appellees to, at the very least, offer evidence that they could neither meet the 35,947 minimum signature requirement nor file their petitions by the statutory deadline. Appellants additionally attacked the legality of the March 17th order, asserting that the Chicago Board lacked authority to agree to an order to lower the minimum signature requirements and/or to extend the filing deadline on behalf of a particular political party contrary to state law.

On April 6, 1977, the District Court denied the motions of the State Board to vacate the orders entered on March 14, 1977 and March 17, 1977. In responding to the law of the case and stare decisis issue, the District Court writes, "The court has great respect for the principle of *stare decisis,* but is not bound by previous cases where different facts are alleged and where new and persuasive legal arguments are raised (App. C, p. 36a).

In justification for issuing a permanent injunction without a hearing, the District Court writes, "This contention fails to consider that the only injunctive relief entered in these cases was based upon a question of law, rather than any disputed issue of fact and that both sides had ample opportunity to argue in behalf of their respective positions." (App. C, p. 36a).

On December 9, 1977, the Court of Appeals affirmed the March 14th permanent injunction and adopted the March 14, 1977 memorandum opinion of the District Court. On the question of the issuance of a permanent injunction without an evidentiary hearing in violation of Fed. R. Civ. P. 65, the Court of Appeals dismissed the argument by stating, in part: "No purpose will have been served by holding an evidentiary hearing in this case. There were no actual disputes as to the grounds on which the injunction was ordered." (App. A, p. 4a).

On the question of the authority of a local election agency to reduce the signature requirement below the minimum set by the trial court and extend the filing deadline for one political party (and not for another political party because it did not meet the new standard agreed to between the local agency and the first political party), the Court of Appeals held this to be moot. The Court reasoned, in part, that the order applied only to the special mayoral election, which was over, and the issue, if repeated, could be reviewed at a later time by the Courts. (App. A, p. 6a).

FEDERAL QUESTIONS ARE SUBSTANTIAL

I.

A UNITED STATES COURT OF APPEALS IS BOUND TO FOLLOW THE LAW OF THE UNITED STATES SUPREME COURT.

The ruling of the Court of Appeals directly contradicted the ruling of this Honorable Court in *Jackson* v. *Ogilvie*, 403 U.S. 925, 91 S. Ct. 2247 (1971), which summarily affirmed a three-judge district court opinion, 325 F. Supp. 864 (N.D. Ill., 1971).

The *Jackson* opinion specifically upheld the Illinois 5% minimum signature requirement and the sixty day filing deadline for independent candidates seeking the office of Mayor of the City of Chicago. In the three-judge opinion, it states at page 868:

> "Jackson argues that the 5% minimum requirement of § 10-3 of the Illinois Election Code operates to limit his and plaintiffs Wilkinson's and Maclin's first amendment rights. He asserts that before they can act to advance his candidacy they must be joined by a group numbering approximately 58,000 qualified electors of the city. The question more pointedly is, can the state limit the availability of the ballot to only those candidates who evidence the support of 5% of the electorate? We think it can. In *Briscoe* v. *Kusper*, 435 F. 2d 1046 (7th Cir. 1970), the Court noted:
>
> > 'A state clearly has a substantial interest in administering its own local elections. This state concern reasonably includes regulation of candidates, and it may well call for limitations on access to ballots by those seeking public office. Such limitations may be justified by the need to prevent subversion or corruption.'

> "While the 5% requirement is higher than the percentage required in a majority of other states (see, *Williams* v. *Rhodes, supra,* 393 U.S. 33 n. 9, 89 S. Ct. 5) nonetheless, we feel it is a reasonable limitation that serves a compelling interest."

Under the doctrines of *stare decisis* and *law of the case,* the Court of Appeals was bound to follow the dictates of this Honorable Court.

The doctrine of the *law of the case* may be applied not only to cases involving the same parties, but also to contests in which the parties have no legal connection with those in the first case. The doctrine is applicable unless it is proven that the circumstances of the second case are so factually different from those of a previous case that the established rule of law cannot be applied, or that a different rule of law from still another case does, in fact, apply, or that the rule of law in question is itself invalid. See Moore, *Federal Practice,* 1B § 0.401.

The facts of the case at bar are irrelevant for the purpose of the issuance of the permanent injunction since the injunction was issued for all future elections – not just the special mayoral election in Illinois. Most important, the Court of Appeals sanctioned the issuance of the permanent injunction in the absence of any evidentiary hearing, concluding there was no factual dispute as to the grounds on which the injunction was ordered.

Consequently, "When, therefore, a federal court enunciates a rule of law to be applied in the case at bar, it not only establishes a precedent for subsequent cases under the doctrine of stare decisis, but as a general proposition, *it establishes the law,* which other courts owing obedience to it *must,* . . . normally apply to the same issues in subsequent proceedings in the case." (Moore, Federal Practice 1B, § 0.404[1]). (Emphasis added).

Therefore, this Court should consider the substantial question of whether a Court of Appeals and District Court can ignore the dictates of a higher court and justify such action by merely stating "The Court has great respect for the principle of *stare decisis*, but is not bound by previous cases where different facts are alleged and where new and persuasive legal arguments are raised." (App. C, p. 36a, and thereby ignoring the point that no evidentiary hearing was held to elicit facts and no new relevant law was cited.

II.

SUBSTANTIAL LEGAL ELECTION QUESTIONS CANNOT BE MOOTED BY THE PASSAGE OF THE ELECTION.

This Court should consider the substantial question of whether a Court of Appeals can avoid deciding a crucial issue through the doctrine of mootness in derogation of the general principles promulgated by this Honorable Court.

Appellee, Chicago Board of Election Commissioners, a public agency, violated Illinois election law by substituting an arbitrary standard in lieu of an objective statutory standard for ballot access (20,000 signatures instead of 25,000 signatures as mandated by the District Court). Specifically, this action was undertaken for the benefit of the U. S. Labor Party – a new local political party. Such reduction was effectuated by an agreed order over the objection of appellant that appellee lacked any discretion whatsoever to set a different standard for ballot access.

Indeed, once the Chicago Board exercised discretion, they violated the equal protection rights of other political parties unable to meet either the judicial standard of

25,000 signatures or the U. S. Labor Party standard of 20,000 signatures. Specifically, the Libertarian Party was denied equal protection by the Chicago Board when they requested a further lowering of signature requirements to 18,000 signatures.

In light of this flagrant violation, the Court of Appeals, holding the issue moot since the election had passed, writes in footnote 2: "We in no way suggest that appellants have failed to raise a substantial legal question on the issue. However, in light of our conclusion that it is moot, we will have to postpone consideration of the merits for another day." (App. A, p. 6a).

The law is clear that passage of an election does not render moot an issue still alive for future elections. In *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 (1969), the Illinois Electoral Board (predecessor agency to appellant Illinois State Board of Elections) refused ~~to certify the~~ plaintiffs who were independent candidates for the office of electors of the President and Vice President of the United States in the 1968 election, on the ground that although the plaintiffs' nomination petitions contained 25,000 signatures, as required by an Illinois statute, the petitions did not meet the requirement of the same statute that they include the signatures of 200 qualified voters from each of at least 50 of the 102 counties within the state. Challenging the constitutionality of this statutory provision, the candidates appealed to this Court from an adverse judgment of the three-judge District Court. Refusing to dismiss the appeal as moot because the 1968 election had been already held, this Court pointed out that the questions raised by the state statute would not be answered and would remain and control future elections as long as Illinois maintained her present system as she had

done since 1935. The problem was, therefore, "capable of repetition, yet evading review", and the need for a resolution of the problem reflects a continuing controversy in the federal–state area.

In *Brown* v. *Chote,* 411 U.S. 452, 420, 93 S. Ct. 1732 (1973), this Court held that the conduct of a primary election pending litigation did not render moot the question, raised by persons seeking to become candidates in the election, whether state election code provisions violated the Federal Constitution in requiring primary candidates to pay a filing fee, thereby barring indigents from seeking elective office, and from voting for the candidates of their choice.

In *Storer* v. *Brown,* 415 U.S. 724, 94 S. Ct. 1274 (1974), reh. den. 417 U.S. 926, 94 S. Ct. 2635, the constitutionality of certain California election laws governing access to the ballot were challenged by several independent candidates. The challenge was instituted prior to the 1972 election, but the appeal was not taken until after the election was conducted. Although it was contended that the plaintiffs would now be precluded effective relief, this Court, retaining jurisdiction, rested its decision on the ground that the issues raised would persist if the state statutes were applied in the same manner in future elections. The Court's failure to resolve the controversy on appeal would permit the controversy to be "capable of repetition, yet evading review." Accordingly, this Court reviewed the operation and application of the California statute in order to simplify or preclude future challenges and afford any future plaintiffs the opportunity to file timely cases so that adjudication of similar issues could be had before the election is held.

A state statute involving elections cannot be challenged and then be left unresolved by the court. The likelihood of repetition of the controversy and the public interest in assuring appellate review are the key elements that were settled in *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm.,* 219 U.S. 498, 31 S. Ct. 279 (1911). This doctrine applies in cases in which the constitutionality of state election laws are declared moot by the intervening conduct of the election in question. The *Southern Pacific Terminal* doctrine identifies an "exception" to the judicial bar of mootness, at least where the litigation involves actions by or against public officials, and the public interest in assuring enforcement of the legislative will and constitutional mandates.

In the case at bar, an administrative agency arbitrarily, in violation of state law, and the supervisory authority of appellant, used as a standard for access to the ballot, the wishes of one political party. Another political party, the Libertarian Political Party, unable to meet the 20,000 signature standard, was rejected by the Chicago Board in their efforts to lower the signature requirement so that they, too, could obtain access to the ballot.

Such favoritism strikes at the very heart of a democratic system, especially in so crucial an area as elections.

Since such agreed order stands as a precedent for local election authorities to arbitrarily alter Illinois law, this Court should consider the question of whether the resolution of such issue should wait for another day.

CONCLUSION

The decision rendered by the 7th Circuit Court of Appeals has changed the law in election cases by setting new standards for ballot access and for election exceptions to the mootness doctrine, contrary to the rules of law pronounced by this Court, thereby creating conflict in settled law in every circuit in this nation.

For the foregoing reasons, this Court should note probable jurisdiction in this case and give plenary consideration with briefs on the merits and oral arguments for the resolution of these questions, the importance of which can hardly be overestimated.

Respectfully submitted,

MICHAEL E. LAVELLE,
100 N. LaSalle Street,
Chicago, Illinois 60602,

MICHAEL L. LEVINSON,
100 N. LaSalle Street,
Chicago, Illinois 60602,

FRANKLIN J. LUNDING, JR.,
100 N. LaSalle Street,
Chicago, Illinois 60602,

Attorneys for Appellant
Illinois State Board of Elections.

APPENDIX

INDEX TO APPENDICES

	Page
A—Per Curiam Opinion of U.S. Court of Appeals For The Seventh Circuit (Decided Dec. 9, 1977)..	1a
B—Memorandum Opinion in Socialist Workers Party, et al. vs. Chicago Board of Election Commissioners, et al. No. 77 C 255 and Gerald Rose, et al. vs. John H. Hanly, et al. No. 77 C 326 (Mar. 14, 1977)	7a
C—Memorandum Opinion in Socialist Workers Party, et al. vs. Chicago Board of Election Commissioners, et al. No. 77 C 255 and Gerald Rose, et al. vs. John H. Hanly, et al. No. 77 C 326 (April 6, 1977)	33a
D—Order in Gerald Rose, et al. vs. John H. Hanly, et al. No. 77 C 326 (March 14, 1977)	39a
E—Chapter 46, Illinois Revised Statutes (1975), Sec. 10-2	40a
F—Chapter 46, Illinois Revised Statutes (1975), Sec. 10-3	44a
G—Notice of Appeal To The Supreme Court of the United States	46a

APPENDIX A

PER CURIAM OPINION

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
December 9, 1977.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

SOCIALIST WORKERS PARTY, et al., and GERALD ROSE, et al.,
Plaintiffs-Appellees,
No. 77-1475 & 77-1476 vs.
ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
—
Nos. 77-C-255, 77-C-326
—
Honorable Bernard M. Decker
Judge.

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the District Court order of March 14, 1977 is hereby AFFIRMED; and, that the appeal from the District Court order of March 17, 1977 is hereby DISMISSED. Costs will be assessed against the appellants. The aforegoing is in accordance with the opinion of this Court filed this date.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH COURT

Nos. 77-1475, 77-1476 (Consolidated)

SOCIALIST WORKERS PARTY, et al.,

Plaintiffs-Appellees,

vs.

ILLINOIS STATE BOARD OF ELECTIONS, et al.,

Defendants-Appellants.

and

GERALD ROSE, et al.,

Plaintiffs-Appellees,

v.

ILLINOIS STATE BOARD OF ELECTIONS,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 77-C-255, 77-C-326—Bernard M. Decker, *Judge*.

ARGUED NOVEMBER 21, 1977—

DECIDED DECEMBER 9, 1977

Before CUMMINGS, PELL, and BAUER, *Circuit Judges*.

PER CURIAM. This is an appeal from orders of the district court which: (1) on March 14, 1977, permanently

enjoined the Chicago Board of Election Commissioners from enforcing those portions of Ill. Rev. Stat., Ch. 46 §§ 10-2 and 10-3 which require nominating petitions for new political parties and independent candidates seeking offices serving less than the entire state to contain more than 25,000 signatures; and (2) on March 17, 1977, set the number of petition signatures required of new political parties and independent candidates seeking the office of Mayor of the City of Chicago in the June 7, 1977 Special Mayoral Election at 20,000 signatures and permitted new political party and independent candidate nominating petitions for the June 7 Special Mayoral Election to be filed on or before April 18, 1977.

I. THE MARCH 14, 1977 ORDER

We affirm the permanent injunction issued on March 14, 1977. We are of the opinion that the district court properly enjoined the appellants on the basis of a well-reasoned equal protection analysis. We, therefore, adopt as the opinion of this court the memorandum opinion of the district court published at 433 F. Supp. 11 (N.D. Ill. 1977).

In addition, however, we must consider several issues raised on appeal that were not addressed in the district court's opinion. Appellants argued that the permanent injunction should be reversed because it did not comply with Fed. R. Civ. P. 65. The gist of appellants' argument was that they were denied an opportunity to be heard because the district could did not hold an evidentiary hearing before ordering the permanent injunction.

No purpose would have been served by holding an evidentiary hearing in this case. There was no factual dispute as to the ground on which the injunction was ordered. The district court permitted appellants to file an offer of proof outlining facts they would present if a hearing were

granted. We find nothing in this offer of proof which, if proved, would have altered the result; indeed, it has not been demonstrated that anything that could have arisen in a factual hearing would have altered the result. The absence of such a hearing, therefore, does not constitute a ground for reversal. *See Hagopian* v. *Knowlton,* 470 F. 2d 201, 207 (2d Cir. 1972); *Securities and Exchange Commission* v. *Frank,* 388 F. 2d 486, 490 (2d Cir. 1968).

Appellants also argued that they did not receive sufficient notice that the court would be considering both a preliminary and a permanent injunction. We question the propriety of this argument in light of the fact that the plaintiffs' motion was entitled "Motion for Preliminary and Permanent Injunction." Nevertheless, we note that appellants' claimed surprise at the district court's decision to consider permanent injunctive relief does not, alone, merit reversal. As the Fifth Circuit stated in *Eli Lilly & Co.* v. *Generix Drug Sales, Inc.*, 460 F. 2d 1096, 1106 (5th Cir. 1972), "surprise alone is not a sufficient basis for appellate reversal; appellant must also show that the procedures followed resulted in prejudice, . . ." We perceive no such prejudice in this case. The decision to enjoin rested on pure equal protection analysis, and undisputed facts, namely the relevant statutes. A more formal notice would not have provided appellants with a greater opportunity to alter this result. *See Standard Oil Company of Texas* v. *Lopena Gas Company,* 240 F. 2d 504, 509-10 (5th Cir. 1957).

For these reasons, we affirm the order of March 14, 1977.

II. THE MARCH 17, 1977 ORDER

On March 17, 1977, the district court issued an order reflecting an agreement by the Chicago Board and the plaintiffs to lower the five percent statutory signature require-

ment to 20,000 signatures and to extend the filing deadline from April 4 to April 18. Appellant (State Board) requested reversal of this order on the ground that the Chicago Board had no authority to enter such an agreement.[1] We will not address the merits of this argument because we hold that the issue is moot.[2]

The order stated categorically that it applied only to the June 7, 1977 Special Mayoral Election which has long passed. Furthermore, this is not an issue which is "capable of repetition, yet evading review." *DeFunis* v. *Odegaard*, 416 U.S. 312, 318-19 (1974); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). We have no reason to believe that a future agreement by an election board to reduce signature requirements and extend filing deadlines in a special election situation, albeit an unlikely occurrence, would evade review. For this reason we dismiss the appeal of the March 17, 1977 order. Costs will be assessed against the appellants.

AFFIRMED IN PART, DISMISSED IN PART.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

1. In the district court, the Chicago Board of Election Commissioners and the State Board of Elections were defendants in the two actions which are consolidated in this appeal. The Chicago Board, however, did not appeal, but filed a responsive brief in opposition to the State Board's contention that the Chicago Board did not have the authority to enter an agreement altering the signature and filing requirements of the statute.

2. We in no way suggest that appellants have failed to raise a substantial legal question on this issue. However, in light of our conclusion that it is moot, we will have to postpone consideration of the merits for another day.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs,
vs.
CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendants. — NO. 77 C 255

—

GERALD ROSE, et al.,
Plaintiffs,
vs.
JOHN H. HANLY, et al.,
Defendants. — NO. 77 C 326

MEMORANDUM OPINION

Background

A special mayoral election has been scheduled for June 7, 1977, in Chicago to fill the vacancy caused by the death of the late mayor, Richard J. Daley. On January 13, 1977, the defendant in these two cases, the Chicago Board of Election Commissioners,[1] released the election calendar for

1. In No. 77 C 255 the members of the State Board of Elections, and John Marcin, the City Clerk of Chicago, are also named as defendants, as are the two boards in their corporate capacities.

this election. Among its specifics, it set the filing dates and signature requirements for petitions for independent candidates for mayor,[2] and for new political parties,[3] i.e. parties other than the Democratic and Republican parties.

The defendants purported to follow the statutory requirements of the Illinois Election Code, Ill. Rev. Stat. ch. 46. Following Ill. Rev. Stat. ch. 46 § 10-6, they set the filing deadline for new political parties on April 4th, 64 days prior to the election. The filing date for independents was initially set on February 19th, the same day as required for candidates in the major party primaries.[4]

The pertinent language regarding signature requirements in § 10-2, applying to new parties, and § 10-3, applying to independents, is identical:

> "not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve ts respective territorial area."[5]

---

2. Independents are defined in Ill. Rev. Stat. ch. 46 § 10-3 as candidates who are "not candidates of any political party."

3. A new political party is any political group which seeks to become an "established political party" but which did not poll more than 5% of the entire vote cast within the political unit at the last election in which that unit voted to elect officers to serve its respective territorial area. A long-standing political party such as the plaintiff Socialist Workers Party may be classified as a "new poitical party" because of lack of electroal success.

4 The primary is scheduled for April 19, 1977.

5. The two sections differ only in that § 10-3 also establishes an 8% signature ceiling for the petitions of independents, and that § 10-2 refers to 5% of the number of "voters" who voted in contrast to § 10-3, which refers to 5% of the number of "persons" who voted.

Nonetheless, the defendants used the voting figures from the April 1, 1975, mayoral election to compute the requirement for independents, and used figures from the November 2, 1976, general election to determine the requirement for new political parties. Thus, the defendants required that the new political parties had to contain 63,373 valid signatures on their petitions, while independents were only required to present petitions with 35,947 signatures.[6]

These two suits were filed by supporters of new political parties and independent candidates seeking access to the ballot to challenge the constitutionality of the Board's determinations.

Case No. 77 C 255 was brought by the Socialist Workers Party and challenges in its first two counts the signature requirements and filing deadlines set for new political partis. Case No. 77 C 326 was brought by the United States Labor Party, and by Gerald Rose, an individual who alleges that he desires to run as an independent in the mayoral election.[7] This case challenges the requirements set out for both new parties and independents. *Rose* v. *Hanly* was brought before this court as related to the earlier filed case. Although the two have not been formally consolidated, they raise essentially overlapping factual and legal issues, and the defendants have filed an identical reply brief in support of both of their motions to dismiss.

In the course of this litigation the defendants have agreed, for the purposes of this special election, to modify

---

6. The requirements for candidates in the major party primaries are calculated on a different basis. Democratic candidates need 4,460 signatures and Republic candidates 2,558 signatures.

7. Individuals asserting that they support these parties and candidates are also named as plaintiffs.

these requirements. Independent candidates are now given an extension until April 4th, the deadline set for new parties to file their petitions. And new political parties are only to be required to submit 35,947 valid signatures, the same amount as required of the independents. Thus, the signature requirements and filing deadlines are now identical for independents and new political parties in the forthcoming election.

Both cases seek injunctive and declaratory relief. As noted, there are pending motions to dismiss in both actions, and both sets of plaintiffs have briefed motions for injunctive relief.

II.

Justiciability and the Effect of Recent Supreme Court Cases On Equal Protection

Defendants have not raised any challenge to the justiciability of an election law challenge as a political question. This defense has been clearly rejected by the Supreme Court. *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Wesberry* v. *Sanders*, 376 U.S. 1, 5-7 (1964); *Baker* v. *Carr*, 369 U.S. 186, 208-237 (1962).

They do, however, argue that the plaintiffs cannot challenge their implementation of the state statutes where it cannot be shown that there was any purposeful invidious discrimination. They cite the statement of the Seventh Circuit that

> "To establish a denial of equal protection a candidate for public office must [allege and] prove the existence of an intentional or purposeful discrimination by the election authorities in which one class is favored over another." *Baum* v. *Lunding*, 535 F. 2d 1016, 1018 (7th Cir. 1976).

Baum, however, dealt with a challenge to a regulation which authorized group petitions for candidates seeking to run together as a "slate." However, after consideration of the merits of plaintiff's claim, the Seventh Circuit found that the regulation was not in fact discriminatory against individual candidates, and was based on justifiable policy grounds. It sustained the trial court's conclusion that the complaint was frivolous. Neither *Baum*, nor *Briscoe* v. *Kusper*, 435 F. 2d 1046 (7th Cir. 1970), also cited by the defendants, deals with claims of discriminatory rules regarding ballot access. Such challenges have been repeatedly brought under the equal protection clause, including *Jackson* v. *Ogilvie*, 325 F. Supp. 864 (N.D. Ill. 1971), the case upon which the Board's defense is focused. See also the numerous cases dealing with similar challenges, cited *infra*.

Going beyond these cases, the defendants argue that the recent Supreme Court cases of *Washington* v. *Davis*, 426 U.S. 229 (1976); and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 LW 4073 (1/11/77), have established discriminatory intent as an element of all equal protection based claims. *Arlington Heights* states that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 45 LW at 4077.

Both of these cases dealt with situations in which officials effected policies which had a discriminatory impact. The Court felt that this was insufficient to sustain a case for denial of equal protection in the absence of "proof that a discriminatory purpose has been a motivating factor in the decision." 45 LW at 4077.

These cases may be distinguished on several grounds. First, the defendants in *Washington* v. *Davis* and *Arlington Heights* were able to show that they disregarded racial

considerations and considered matters relating solely to job qualifications in hiring and community needs in zoning. However, in the instant case, the challeged policy was the implementation of a law designed to discriminate against frivolous candidacies and parties. The challenged portions of the Election Code are deliberately structured to deny access to the ballot to certain members of the classification in which the plaintiffs are placed by the law. The racial impact in the two Supreme Court cases was found to be incidental;[8] the special burdens placed upon the defendants' classes and challenged in these cases are the central point of the statutory scheme.[9]. .

That these special requirements are more onerous than those placed upon major party candidates or statewide candidates does not *per se* prove a violation of equal protection, but it does put into issue the reasonableness of the classifications and the burdens.

Furthermore, the defendants ignore the fact that the instant cases assert due process claims raising first amendment issues. Defendants are in error when they assert that question of ballot access are cognizable only under the equal protection clause. In *Williams* v. *Rhodes*, 393 U.S. 23 (1968), the court was faced with a challenge to Ohio's statutory scheme for qualifying third parties on the ballot. The court noted

---

8. It is also arguable that these cases are limited to equal protection claims involving alleged racial discrimination.

9. This action must be viewed as an attack on the constitutionality of the applicable portions of the Illinois Election Code. The named defendants are those who have the duty of implementing the challenged statutes. In dealing with the essential legal issues, the absence of animus on the part of the individual defendants is not dispositive of the constitutional questions.

> "the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States." 393 U.S. at 30-31.

Since *Williams* courts have repeatedly considered the First Amendment claims raised by challenges to state ballot laws. *American Party of Texas* v. *White*, 415 U.S. 767 (1974); *Storer* v. *Brown*, 415 U.S. 724 (1974); *Jenness* v. *Fortson*, 403 U.S. 431 (1971); *Riddell* v. *National Democratic Party*, 508 F. 2d 770 (5th Cir. 1975); *Smith* v. *Cherry*, 489 F. 2d 1098 (7th Cir. 1973); *McCarthy* v. *Kirkpatrick*, 420 F. Supp. 366 (W.D. Mo. 1976); *Bendinger* v. *Ogilvie*, 335 F. Supp. 572 (N.D. Ill. 1971); *Jackson* v. *Ogilvie, supra.*

III.

Ripeness

Noting that the deadlines for filing petitions have not yet passed, the defendants assert that this action is not yet ripe. They contend that there is no real controversy at present, and that plaintiffs are in fact seeking an advisory opinion from the court.

The plaintiffs counter by stressing that they are currently forced to expend their political resources in an effort to satisfy what they feel are unconstitutional requirements. They thus claim to suffer an immediate injury.

The defendants' own brief reveals that the courts have considered this type of situation to raise a controversy ripe for judicial determination. They note that the pertinent filing deadline for the mayoral election in *Jackson* v. *Ogilvie, supra,* was February 1, 1971. The plaintiff filed his case on December 10, 1970, two months before the deadline. The three-judge court considered that case and entered its decision on January 28th, also prior to the filing date. There is no reason why this court should not similarly entertain this case.

IV.

Standard Of Review

The numerous cases that have entailed consideration of state ballot access laws have focused upon the balance of the interests of the plaintiffs in effectively participating in the electoral process, and furthering their desires to express their political beliefs through political associations, against certain state concerns in regulating the electoral process. In *Lubin* v. *Panish,* 415 U.S. 709 (1974), the Court expressed some of these state concerns:

> "That 'laundry list' ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not. Rational results within the framework of our system are not likely to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success." 415 U.S. at 715-16.

In *Bullock* v. *Carter,* 405 U.S. 134, 145 (1972), the Court expressed concern for the state need to "prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections." The Court spoke in *Storer* v. *Brown, supra,* of the state interest "in encouraging compromise and political stability." 415 U.S. at 729. The Supreme Court has therefore upheld properly drawn statutes that seek to require "some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot." *Jenness* v. *Fortson, supra,* at 442.

The contrasting concerns of the plaintiffs are well described in the passage from *Williams* v. *Rhodes,* quoted *supra.* The basic political rights of free speech and free association, and free exercise of the franchise need no further amplification. It should not be ignored that third party candidates and programs have had significant impact on our history and political values, even when the electorial campaigns themselves were unsuccessful.[10] Access to the ballot is a threshhold means for general consideration of the ideas espoused by these parties and candidates. Nor can it be ignored that one of our current major parties was itself originally a minor political group. Finally, there has been much concern expressed recently over the substantial portion of the electorate that has failed to exercise its franchise in preceding elections. This absenteeism may itself reflect discouragement with the range of choices on the ballot, or a desire for an effective means of casting a protest vote.

---

10. Electorally unsuccessful parties whose platforms have greatly affected American life incude the Free Soil Party, Populist Party, Prohibitionist Party, Socialist Party and several manifestations of the Progressive Party.

Where such important rights are to be balanced against regulations purporting to protect significant state interests, this court has stressed that

> "[b]efore a state can place any restrictions upon the freedom to associate freely and to vote, it must be shown that a compelling state interest justifies such regulation." *Bendinger* v. *Ogilvie, supra,* at 574.

This means that the court is to subject the challenged portions of the Election Code to "strict scrutiny." As was recently said in *McCarthy* v. *Kirkpatrick, supra,* at 373:

> "While the state has a legitimate interest in restricting access to the ballot in order to maintain the integrity of the ballot and preserve an orderly election process, the Supreme Court has required that the means chosen by the state to achieve its goals be carefully scrutinized, for they necessarily place burdens on the right of individuals to associate for the advancement of political beliefs, and the rights of qualified voters to cast their votes effectively."

A review of ballot access cases reveals that the courts have consistently expressed their determination to apply this more rigorous form of constitutional analysis. *American Party of Texas* v. *White,* 415 U.S. 767 (1974); *Bullock* v. *Carter,* 405 U.S. 134 (1972);[11] *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Riddel* v. *National Democratic Party,* 508 F. 2d 770 (5th Cir. 1975); *Briscoe* v. *Kusper,* 435 F. 2d 1046 (7th Cir. 1970); *Salera* v. *Tucker,* 399 F. Supp. 1258 (E.D. Pa. 1975); *Lawlor* v. *Board of Election Commissioners,* 395 F. Supp. 692 (N.D. Ill. 1975); *Lendall* v. *Bryant,* 387 F. Supp. 397 (E.D. Ark. 1975); *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill. 1971).

---

11. While there is language in *Bullock* v. *Carter* to the effect that challenges to ballot barriers do not *per se* require strict scrutiny, 405 U.S. at 143, the Court did apply that standard. *See Salera* v. *Tucker,* 399 F. Supp. 1258, 1263, n. 5 (E.D. Pa. 1975).

V.

The 35,947 Signature Requirement

As noted, the defendants have determined that independents and new political parties must obtain 35,947 valid signatures on their petitions in order to qualify for the special mayoral ballot.[12] They assert that this is derived from the statutory requirement of 5% of the voters at the last general election at which Chicago voters voted as a unit for a city office.

The defendants maintain that they are merely complying with the law, and emphasize that a three-judge court sustained the 5% requirement in *Jackson* v. *Ogilvie, supra.*

Jackson was brought by an independent candidate in the 1971 regular mayoral election, and challenged the signature

---

12. Since the defendants have agreed not to apply the 63,373 signature requirement, derived from the 1976 election figures, for new parties, and since the court has made its own determination of the validity of the lesser 35,947 requirement, derived from the 1975 mayoral election figures, the issue of the constitutionality of utilizing disparate statistics to satisfy identical statutory requirements is essentially moot. However, it should be noted that *Jackson* v. *Ogilvie, supra,* construed the statute as requiring 5% "of the total number of votes which were cast in *the last preceding election for the office he currently seeks.*" 325 F. Supp. at 866. Furthermore, since Cook County Circuit Judges from Chicago "serve" a judicial district covering all of Cook County, the 1976 elections did not select officeholders serving any district limited to Chicago. There is, therefore, no apparent statutory basis, nor any logical reason to impose a more severe burden on new parties than independents, or to calculate the 5% requirement on the basis of non-municipal election figures.

requirements in Ill. Rev. Stat. ch. 46 § 10-3, as well as the filing deadlines set in §10-4. The majority opinion, supported by Judge Lynch and Judge Perry, held that

> "[w]hile the 5% requirement is higher than the percentage required in a majority of other states (see Williams v. Rhodes *supra*, 393 U.S. 33 n. 9, 89 S. Ct. 5) nonetheless we feel it is a reasonable limitation that serves a compelling state interest." 325 F. Supp. at 868.

A vigorous dissent by Judge Pell noted that no evidentiary hearing had been held to prove the compelling state interest, and concluded, "I am unable to agree nor can I conceive that there is a real possibility of demonstration supporting a compeling state interest in adherence to the 5% restrictive requirement." 325 F. Supp. at 869.

While the defendants argue that the majority opinion is dispositive of these issues, the plaintiffs argue that *Jackson* can be factually distinguished from the instant circumstances.

Essentially this argument is based on the distinction between a regular election and a special election. They note that a candidate or party seeking ballot position in a regular election can begin preparations for signature gathering well in advance of the deadline. The date for the election is known well in advance, and there is no barrier to early circulation of petitions.

By contrast, the need for a special election only materialized on December 20, 1976, when Mayor Daley died. Petitions could not be circulated prior to January 13, the date on which the election was fixed. Thus these plaintiffs have only from January 13 to April 4, 81 days, to obtain the needed signatures.

The unique circumstances created by a special election do, of course, change the context in which the appropriateness of these ballot barriers is to be evaluated. In a case raising slightly different issues, the Illinois Supreme Court has acknowledged that

> "[i]n filling vacancies in office by special primary and election, there must be room for an expansion and contraction of time tables which are observed in the regular election procedure." *People ex rel. Adamowski* v. *Kerner*, 19 Ill. 2d 506, 514 (1960).

More importantly, the United States Supreme Court has repeatedly emphasized that the constitutionality of these types of restrictions must be evaluated upon a situation by situation basis. In *Storer* v. *Brown*, *supra*, it was stated:

> "[T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree,' *Dunn* v. *Blumstein*, *supra*, at 348, very much a matter of 'consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' *Williams* v. *Rhodes*, *supra*, at 30; *Dunn* v. *Blumstein*, *supra*, at 335. What the result of this process will be in any specific case may be very difficult to predict with great assurance." 415 U.S. at 730.

Simiarly, in *Jenness* v. *Fortson*, *supra*, at 437, the Court emphasized the analysis of *Williams* v. *Rhodes*, *supra*, which demanded a study of "the totality" of the challenged election laws.

The validity of a signature requirement cannot be analyzed, therefore, without consideration of the circumstances

and timeframe within which the petitions may be circulated.[13] In this vein, the court in *Lendall* v. *Bryant, supra,* at 402, noted that "[the signature requirement and the filing deadline] reinforce each other in interdicting independent candidacies . . ."

While the court in *Jackson* v. *Oglivie, supra,* considered the validity of a 5% signature requirement and a filing deadline 64 days prior to the election, it did not do so in the circumstances of a constricted period for circulating petitions. This, in itself, denies *Jackson* any *stare decisis* effect in this action, and leaves the Election Code open to challenge in the context of a special mayoral primary.

Furthermore, since there is no "litmus-paper" test for the validity of ballot-barriers, there is a need for some judicial examination of evidence pertaining to the scope of the burden created by the election laws. In *Storer* v. *Brown, supra,* at 738, the Court stated that "[w]e must, therefore, inquire as to the nature, extent, and likely impact of the California requirements." In the absence of such evidence, the court vacated the judgment and remanded the case to the district court "for further proceedings to determine whether the California election laws place an unconstitutional burden on [plaintiffs'] access to the ballot."

Jackson v. *Ogilvie, supra,* was decided prior to *Storer.* The dissent by Judge Pell noted that "no evidentiary hearing has been held." 325 F. Supp. at 869. The analysis of

13. In *Storer* v. *Brown* the court questioned whether there was any compelling state interest in requiring the collecting of signatures in a limited 24 day period, where the quota was itself substantial. 415 U.S. at 743.

the majority was done *in vacuo,*[14] without any explanation for the finding that "[5%] is a reasonable limitation that serves a compelling state interest."

In *Salera* v. *Tucker,* 399 F. Supp. 1258 (E.D. Pa. 1975), cited by the defendants, the court ruled unconstitutional a portion of the Pennsylvania election code previously sustained by an earlier three-judge court decision. Without challenging the correctness of the prior case, the court nonetheless decided "that the factual situation in our case warrants a different conclusion." 399 F. Supp. at 1268. Similarly, the instant cases, as noted *supra,* present a different factual context than *Jackson.* Since *Jackson* also failed to examine the factual situation to see whether the Illinois statutes created "burdens so severe as to confer an effective political monopoly on the two major parties," *Storer* v. *Brown,* 415 U.S. at 729, there is a definite need to examine the current political realities in Chicago to see whether these cases, too, "[warrant] a different conclusion."

The defendants also argue that requirements as stringent as those posed by the Illinois statutes have been frequently upheld by the courts. However, a review of these cases does not persuade the court that a 5% requirement is constitutional *per se.*

It is true that there is language in *Storer* v. *Brown, supra,* at 740, stating that "[s]tanding alone, gathering 325,000 signatures in 24 days [statewide in California in

14. Indeed the only data cited in [illegible]*n* relating to the necessity for the 5% requirement cuts against the majority's conclusions. The majority noted that this requirement "is higher than the percentage required [illegible] majority of other states"; Judge Pell called this a[illegible]erstatement, noting that 46 states were more lenient th[illegible]llinois.

support of an independent presidential candidacy] would not appear to be an impossible burden." The California statute, like the Illinois regulation at issue before this court, calculated the 5% figure on the basis of the votes cast at the preceding general election rather than the total of registered voters. It may have been harsher than the Illinois statute by excluding those who voted in the primary from signing the petitions.[15]

On the other hand the Court remanded *Storer* for a hearing to clarify the factual context of the statute. It was concerned, among other issues, with ascertaining whether "*in the context of California politics,* could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" 415 U.S. at 742 (Emphasis added). The court mentioned the value of determining whether in the past "candidates have qualified with some regularity."

In *Jenness* v. *Fortson, supra,* the court also upheld a 5% signature requirement. While the 5% figure was based on the larger total of registered voters, rather than votes cast, in the last election, Georgia law permitted voters to sign more than one petition, and to both sign petitions and vote in the primary. Furthermore, candidates had 180 days in which to gather the signatures. The court's conclusion that the Georgia law did "not operate to freeze the political

---

15. The defendants note that 35,947 actually represents only 2.1% of the electorate. This discrepancy reflects the low turnout at the last mayoral election. The parties have not clarified to the court their view of the effect signing a petition for a new party or an independent has on the ability of a voter to sign other petitions, or vote in the primary.

status quo," 403 U.S. 438, also relied on a stipulation of facts revealing that the nominating petition route had been employed successfully by recent candidates for governor and President.

Similarly, in *American Party of Texas* v. *White,* 415 U.S. 767 (1974), the court noted that two of the original party plaintiffs had satisfied the challenged petition requirements. Furthermore, the requirements were not as severe as those in issue in the instant cases. Texas required 1% of the vote for governor at the last general election to obtain statewide ballot position for minor parties. A period of 55 days was allowed to circulate the petitions. Independent candidates had to satisfy a signature requirement of 3% to 5%. However, the smaller percentage applied to larger units such as a congressional district, and there was a 500 vote maximum requirement.

The court has before it little information upon which it might hazard a judgment whether the challenged election laws unconstitutionally operate as an exclusionary device structured to "freeze the status quo," particularly in the context of a special Chicago mayoral election. The plaintiff Socialist Workers Party did manage to satisfy the 41,403 signature requirement for the 1975 mayoral election. Still, this was achieved without the more stringent time limitations affecting the current election. There is no evidence that any other independent or third party candidate has ever satisfied the 5% test for a Chicago city-wide election.

The evidence presently before the court makes it impossible to establish the maximum signature requirement within the toleration of the Constitution. Nonetheless, it may be held with certainty that this requirement can in no event exceed 25,000.

Both § 10-2 and § 10-3, which establish the 5% requirement for ballot access for less than statewide elections, also contain provisions that petitions containing 25,000 signatures will be sufficient to obtain ballot placing for statewide races. These signatures may be obtained exclusivly in one country, or even in one city. *Communist Party of Illinois* v. *State Board of Elections,* 518 F. 2d 517 (7th Cir. 1975). The plaintiffs argue that the distinction between the statewide requirements and the 35,947 quote for Chicago mayoral petitions is an irrational denial of equal protection for participants in Chicago municipal elections.

The defendants counter that the contrast with the 25,000 requirement was considered in *Jackson* v. *Ogilvie, supra.* However, it appears that it was only referred to in passing in one sentence of a brief submitted by the defendants in that case. There is no discussion of this issue whatsoever in either the majority opinion or in the dissent. In such a situation there is little reason for this court to hesitate to re-evaluate an important contention. This is particularly true where it is raised in the different factual context of the forthcoming special election. *Salera* v. *Tucker, supra.*

One of the most fundamental principles of constitutional analysis is that

> "even though the governmental purpose be legitimate and substantial, the purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

The need to apply the "least restritcive alternative" has been applied by the Supreme Court to election law challenges:

> "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper* v. *Pontikes,* 414 U.S. 51, 59 (1973).

The Seventh Circuit stressed this requirement in *Briscoe* v. *Kusper,* 435 F. 2d 1046, 1054 (7th Cir. 1970), where it held:

> "This state concern . . . may well call for limitations on access to ballots by those seeking public office. . . . Assuming the constitutional legitimacy of such an objective, due process nevertheless requires that the state accomplish that end narrowly and fairly to avoid obstructing and diluting these fundamental liberties."

In *Lendall* v. *Bryant,* 387 F. Supp. 397, 402 (E.D. Ark. 1975), the court wrote that

> "a State may regulate and to some extent restrict the access of independent candidates to the ballot. . . . However, the measures adopted by the State must not go beyond what the State's compelling interests actually require, and broad and stringent requirements or restrictions with respect to would-be independent candidates cannot stand where more moderate ones would do as well."

This court made the same point in *Bendinger* v. *Oglivie,* 335 F. Supp. 572, 575 (N.D. Ill. 1971), when it pointed out that

> "it must be shown that the state statute in question is not only as fair as possible, but also that it infringes upon the First Amendment rights of those affected as little as practicable under the circumstances.

See also, Dunn v. *Blumstein,* 405 U.S. 330 (1972); *Williams* v. *Rhodes, supra; Riddell* v. *National Democratic Party, supra.*

In drafting the requirement for state-wide races, it must be assumed that the legislature determined the minimum showing of adherents necessary to satisfy the state interest in screening out frivololus candidacies. The legislature found that 25,000 signatures would demonstrate the needed "modicum of support." Presumaby the 5% requirement was drafted out of concern for smaller election districts, where 25,000 voters would be a disproportionate share of the electorate. The size of Chicago and Cook County, however, create the anomaly that 25,000 signatures may fall short of the 5% requirement.

It is not necessary to determine whether this legislative draftmanship reflects carelessness or solicitude for the interests of the major parties in Cook County and Chicago. The court cannot find any rational reason why a petition with identical signatures can satisfy the legitimate state interests for restricting ballot access in state elections, and yet fail to do the same in a lesser unit. *Lendall* v. *Jernigan*, #LR-76-C-309 (E.D. Ark. 1/4/77). Any greater requirement than 25,000 signatures cannot be said to be the least drastic means of accomplishing the state's goals, and must be found to unduly impinge the constitutional rights of independents, new political parties, and their adherents.[16]

---

16. The plaintiffs argue that the proper quota for Chicago should be calculated by applying the Chicago percentage of the statewide vote in 1976 to the 25,000 statewide requirement. This would be 26.18% of 25,000 or 6,545. The court's function in this case is not to rewrite the election code for the legislature, but to determine the outer limits of a constitutionally acceptable ballot access limitation. This cannot be determined without consideration of evidence as to exclusionary effect of any signature requirement under 25,000.

VII.

The April 4 Filing Deadline

As noted, the defendants have agreed to set April 4, 1977, as the filing deadline for petitions for both independents and new political parties.[17] This date is 64 days prior to the special mayoral election, and comes 15 days before the major party primaries.

The plaintiffs' attack on this time frame has two thrusts. First, they argue that the 81 days it allows for circulation of petitions is insufficient. Second, they claim that a pre-primary deadline is too far removed from the election and forces them to attempt to secure signatures in a political vacuum.

Unlike the election codes of other states such as Pennsylvania, Texas and California, the Illinois election laws do not normally confine the circulation of petitions to any restricted period. The circumstance of a finite 81 day-period arises solely because the unexpected need for a special election in effect created an "opening date" for petition gathering. Thus this issue does raise a challenge to the normal functioning of the Illinois statute.

This opinion has already stressed that the constitutionality of a ballot access restriction cannot be properly decided without consideration of the effect of the total regulatory scheme. As a consequence, the appropriateness of an 81-day period is affected by this court's determination that no more than 25,000 signatures need be obtained by plaintiff parties and candidates.

---

17. This renders moot the plaintiffs' challenge that the separate statutory filing deadlines for independents and new political parties are arbitrary, irrational and discriminatory.

An 81-day circulation period for the collection of 25,000 or even fewer signatures appears to be within the limits of constitutional tolerance, absent extraordinary circumstances. This opinion has quoted language from *Storer* v. *Brown, supra,* at page 13, finding that a much more severe requirement was likely to be permissible.

Relying on this passage, the court in *Salera* v. *Tucker,* 399 F. Supp. 1258 (E.D. Pa. 1975), held that, in the absence of special needs or other distinguishing circumstances, Pennsylvania could require state-wide candidates to obtain approximately 35,000 signatures within 21 days.

The instant 81-day period gives substantially more time to the plaintiffs in which to obtain a smaller number of signatures, although admittedly from a smaller pool of voters.[18] As a result, absent an evidentiary showing that this time period would significantly impede the access to the ballot of a reasonably diligent party or candidate, the 81-day period could not justify an order extending the filing deadline. The court will not encroach on the legislative prerogative of determining the most appropriate period within constitutional limits.

The question of remoteness from the actual election day does raise a more viable argument. The issues are less likely to be defined, and public interest is likely to be lower when the actual election is far off.[19] Several courts have

---

18. The Pennsylvania statute required 2% of the previous voter turnout for ballot access, in contrast with the Illinois 5% requirement.

19. It is true that voter interest in a primary election may be higher in districts where nomination by the majority party is normally "tantamount" to election. Still, that interest may not reach its peak until the vote is imminent.

stressed recently that a remote deadline does indeed unconstitutionally affect the ability of new parties and independents to mount a successful drive. *Salera* v. *Tucker, supra,* at 1266; *Lendall* v. *Bryant, supra,* at 402; *Bradley* v. *Mandel,* #T-76-638 (D. Md. 5/17/76); *McCarthy* v. *Kirkpatrick, supra,* at 374.

The cases cited by the defendants do not dispose of this line of holdings. While the Supreme Court allowed a cutoff 120 days prior to the general election in *American Party of Texas* v. *White, supra,* the Texas statute allowed the circulation of petitions for 55 days *after the primary.* Similarly, the deadline sanctioned in *Storer* v. *Brown, supra,* 60 days prior to the general election, also permitted post-primary gathering of signatures. More importantly, *Salera* v. *Tucker, supra,* was summarily affirmed *sub nom. Tucker* v. *Salera,* __ U.S. __, 44 USLW 3526 (3/22/76), and is a binding statement of the law. *Hicks* v. *Miranda,* 422 U.S. 332 (1975).

It is true that the invalid deadlines overthrown in *Lendall* and the other cases were far more remote than the instant deadline. In *Lendall* petitions had to be submitted two months before the primary and 210 days before the general election. In *McCarthy* the Missouri law required that the petitions be in 97 days before the primary. The Maryland deadline in *Bradley* was 70 days before the primary and 239 days before the general election. *Salera* upset a deadline seven weeks prior to the primary, and as much as 218 days prior to the general election. By contrast, April 4th is only 15 days before the primary, and 64 days before the special election.

On the other hand, the courts in both *Bradley* v. *Mandell* and *McCarthy* v. *Kirkpatrick* accepted an analogy between an independent's petition circulation and a major party primary. While the comparison is not perfect, it is

true that the petition campaign and the primary results both determine the final composition of the election ballot. This is the reason why the courts wil sanction sterner quotas for third parties and independents than for candidates in party primaries; the latter are not guaranteed a place in the general election. As a result, a petition drive for new parties and independents is in fact equivalent to a primary.

It follows that the most fruitful time for gathering signatures is likely to be during the closing days of the primary campaign, when public interest regarding the future composition of the ballot is at a peak. The recent cases, cited *supra*, make it clear that it would be a significant burden on the plaintiffs to foreclose petition collection during the heat of a primary campaign by establishing a pre-primary filing deadline.[20]

This type of burden on the exercise of constitutionally protected rights is subject to strict scrutiny for a truly compelling state justification for the impediment. *Salera* and *Bradley* have rejected the argument that a pre-primary cut-off is necesary to protect the integrity of the ballot from "independent" candidacies launched by individuals defeated in the primary. While the pre-conclusion of spiteful splinter challenges may be essential to the preservation of the party system, there are alternative safeguards which are not so overinclusive. *See also Storer* v. *Brown*, *supra*, at 724. In any event, this is not a real problem as long as the deadline is not set after the primary results are made known.

---

20. The three-judge court in *Bradley* permitted the plaintiff to collect signatures until the date of the primary. It added in a footnote that "Bradley may be entitled to more, but that case is not before us and we do not decide it."

It is true that the Supreme Court has acknowledged that the state needs to set up a filing cut-off date to provide time for the verification of signatures, litigation of any challenges, and preparation of the final ballots. *American Party of Texas* v. *White*, *supra*, at 767, no. 18. However, *Salera* and its progeny have held that the state does not have *carte blanche* in fixing the cut-off. The date must be justified by proof of the actual time needed to accomplish the post-filing tasks.

In this regard, it is not irrelevant that the primary is also fixed with regard to the time needed to consider post-primary disputes as to the results and the conduct of the vote.

In sum, the motion to dismiss the claims regarding the filing deadlines must be denied. The appropriateness of injunctive relief on this question will depend on the evident adduced as to urgency and possible compelling state reason for setting the filing deadline prior to the April 19th primary.

VIII.

Summary

The complaints in these two cases state a claim for relief with respect to both the signature requirements and the petition filing deadlines imposed upon new political parties and independent candidates in the forthcoming special mayoral election. Accordingly, the defendants' motions to dismiss are hereby denied.

The court declares that any requirement of more than 25,000 signatures for the mayoral petitions of the plaintiffs is unconstitutional.

Accordingly, it is ordered that the defendants, John Hanly, Marie H. Suthers, and Howard C. Medley, are permanently enjoined[21] from enforcing those portions of Ill. Rev. Stat. ch. 46 § 10-2 and §10-3 requiring that petitions for offices serving less than the entire state contain more than 25,000 signatures. It is further ordered that the defendants, John Hanly, Marie H. Suthers, and Howard C. Medley, are hereby enjoined to accept as valid those nominating petitions for new political parties and independent candidates in the 1977 Special Mayoral Election which contain at least 25,000 signatures if filed within the period as allowed by law.

For the reasons stated herein, the court will stay determination of plaintiffs' motion for an injunction estabishing the signature requirement at less than 25,000, and for an injunction changing the deadline for filing of plaintiffs' petitions to a date less than 64 days removed from the general election, pending presentation of further evidence.

The parties are requested to attend a pretrial conference on Thursday, March 17, 1977, at 9:30 o'clock A.M., to discuss the scheduling of a hearing in these cases, and to possibly reach a stipulated agreement for the regulations pertaining to the instant special mayoral election.

ENTER:

_____

United States District Judge

DATED: March 14, 1977.

---

21. Injunctive relief on this point is appropriate at this point. Any requirement over 25,000 is *per se* excessive in light of the requirement for statewide office. There is thus an absolute certainty of success on the merits for the plaintiffs on this claim. Without an injunction the plaintiffs will be injured in the exercise of their constitutional rights. There is no countervailing state or public interest in a denial of immediate injunctive relief.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs,
vs.
CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendants.
NO. 77 C 255

—

GERALD ROSE, et al.,
Plaintiffs,
vs.
JOHN H. HANLY, et a.,
Defendants.
NO. 77 C 326

MEMORANDUM OPINION

The Illinois State Board of Elections, a defendant in Case No. 77 C 255, *Socialist Workers Party* v. *Chicago Board of Election Commissioners,* has moved to vacate the permanent injunction[1] entered in that case and the com-

---

1. The injunction required the defendant members of the Chicago Board of Election Commissioners to accept as valid and sufficient petitions containing 25,000 signatures nominating independent candidates and new political parties in the 1977 Special Mayoral Election for the City of Chicago.

panion case of *Rose* v. *Hanly*, No. 77 C 326,[2] on March 14, 1977, as well as the subsequent order entered in these cases on March 17, 1977.[3] In support of its motion it has submitted a legal memorandum containing an offer of proof.

The instant complaints challenged the signature requirements and filing deadlines established for independent candidates and new political parties seeking a place on the ballot in the forthcoming special mayoral election in Chicago. Both sets of plaintiffs and the defendant Chicago Board of Election Commissioners filed voluminous briefs on the legal issues raised by defendants' motion to dismiss. After consideration of these briefs, the court determined as a matter of law that it was unconstitutional to require a greater signature requirement of candidates and parties seeking less than statewide office than the maximum requirement set for statewide offices. Accordingly, the court declared that any requirement of more than 25,000 signatures for Chicago mayoral petitions was unconstitutional, and entered a permanent injunction to that effect.

The defendant State Board raises various issues in its brief, most of which have been discussed at some length in the detailed memorandum opinion entered in these cases on March 14, 1977.

---

2. The State Board was not named as a defendant in *Rose* v. *Hanly;* however, it did receive copies of the briefs submitted in that case.

3. The March 17th order reflected the agreement between the plaintiffs in *Rose* v. *Hanly* and the defendant Chicago Board to set petition requirement for the 1977 Special Mayoral Election at 20,000, and to extend the filing deadline to April 18th.

The argument that this case was filed prematurely in that it was brought before the original April 4, 1977, deadline was discussed at pages 7-8 of the memorandum opinion. Defendant's contention that the plaintiffs failed to exhaust their administrative remedies by not contacting the State Board prior to the filing of the lawsuit is of no relevance to a constitutional attack on a state statute. In any even, the State Board itself emphasizes that such recourse would have been futile, since it stresses that it would have upheld the signature requirements challenged by the plaintiffs and found by this court to be unconstitutional.

The State Board also argues that the principle of *stare decisis* required that this court be bound by the decision of the three-judge court in *Jackson* v. *Ogivie,* 325 F. Supp. 864 (N.D. Ill. 1971), which upheld the challenged ballot access requirements. This was, of course, the primary legal argument relied upon by the defendant Chicago Board of Election Commissioners. The court considered this contention in the memorandum opinion at pages 11-20. It noted that in the context of this action, a special mayoral election rather than a regularly scheduled mayoral election, made the ballot access requirement more arduous. This is not denied by the State Board, although it does contend that the requirements are not insuperable even in the circumstances of a special election. The court gave other reasons why the conclusion reached in *Jackson* was not necessarily binding in this action.

Most importantly, the conclusion that the 5% requirement for Chicago mayoral candidates violated the equal protection clause was based upon an argument which was

not considered by the *Jackson* court.[4] The court has great respect for the principle of *stare decisis*,[5] but is not bound by previous cases where different facts are alleged and where new and persuasive legal arguments are raised.

The defendant State Board also argues that a permanent injunction could not be entered without a hearing. This contention fails to consider that the only injunctive relief entered in these cases was based upon a question of law, rather than any disputed issue of fact, and that both sides had ample opportunity to argue in behalf of their respective positions.

The only facts related to the injunction were the undisputed points that the defendants had established the signature requirement of 35,947 for the special mayoral election, and that the Illinois election laws require no more than 25,000 signatures for ballot placement in statewide offices. The court ruled that as a matter of law plaintiffs' claims were to be evaluated under the "strict scrutiny" standard of constitutional review, and that the state had to choose the "least restrictive alternative" in setting petition requirements designed to further its legitimate purposes. The court could not find any rational reason why a petition with identical signatures could satisfy these state interests in statewide elections, and yet fail to do the same in a lesser political unit, opinion at page 20. The defendant Chicago Board did not advance any rational

---

4. This argument was mentioned in passing in a brief by the defendants but was ignored in both the majority and dissenting opinion in *Jackson*.

5. The four additional cases cited by the defendant State Board as support for the state ballot requirements were all discussed at length in this court's memorandum opinion.

reason for this greater burden on less-than-statewide candidates, nor are any advanced by the defendant State Board.

The injunction and declarative relief entered by the court was limited to this one finding of law based on undisputed facts. The defendant State Board cannot argue that it was entered without an opportunity to be heard. It was aware of the arguments raised in the plaintiffs' complaint and in plaintiffs' briefs, as well as the responses made by the defendant Chicago Board in behalf of their mutual position. It had the chance to file its own briefs on this issue, and chose not to do so. Since there was no factual dispute, a hearing would have been meaningless following the extensive legal argumnts on briefs.

The remaining relief sought by the plaintiffs, a still greater reduction in the signature requirement and an advancement of the filing deadline, were found by the court to reflect a valid cause of action. However, the court found that these claims did raise factual questions, and that injunctive relief could not be granted without further evidence. The argument that a hearing is needed before the determination of these claims is therefore correct, but irrelevant.

In summary, the court did have jurisdiction to consider the instant cases, which presented a ripe controversy between the parties. The decision of *Jackson* v. *Ogilvie, supra*, was not binding upon the court in this action, since the plaintiffs raised new factual and legal issues. The injunction entered on March 14, 1977, was limited to one issue where there was no factual dispute, and upon which both sides had been given ample opportunity to express their views. The subsequent order of March 17th reflected an agreement between the plaintiffs in case No. 77 C 326

and the defendants therein. The 20,000 signature requirement and the April 18th filing deadline agreed to by the parties do not represent any conclusion by the court as to the limits of a constitutionally permissible ballot restriction scheme.[6]

Accordingly, the motion of the defendant Illinois State Board of Election Commisioners to vacate the orders entered in these cases on March 14, 1977, and March 17, 1977, is hereby denied.

ENTER:

/s/ BERNARD M. DECKER
United States District Judge

DATED: April 6, 1977.

---

6. The court agrees with the State Board that it is not a judicial function to legislate a ballot access statute. However, it does have the power to find that restrictions on first amendment rights are violative of the equal protection clause. In sum, a court may only set the outer limits of a permissible statutory scheme, leaving the specifics to legislative discretion.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GERALD ROSE, et al., Plaintiffs,
vs.
JOHN H. HANLY, et al., Defendants.
NO. 77 C 326

ORDER

This matter coming on to be heard by the Court, the Court hereby finds and orders that solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977 that:

(A) The number of signatures required to fulfill the five percent signature requirements of Ill. Rev. Stat., Ch. 46, Par. 10-2 to qualify for placement on the ballot as a new political party in the Special Mayoral Election shall be 20,000 signatures.

(B) The number of signatures required to fulfill the five percent signature requirements of Ill. Rev. Stat., Ch. 46, Par. 10-3 to qualify for placement on the ballot as an independent candidate in the Special Mayoral Election shall be 20,000 signatures.

(C) That the last date for filing either as a new political party or as an independent candidate in the Special Mayoral Election shall be April 18, 1977.

ENTER:

JUDGE

DATED: March 17, 1977.

APPENDIX E

Chap. 46, Ill. Rev. Stat. (1975), Sec. 10-2

§ 10-2. The term "political party," as hereinafter used in this Article 10, shall mean any "established political party," as hereinafter defined and shall also mean any political group which shall hereafter undertake to form an established political party in the manner provided for in this Article 10: Provided, that no political organization or group shall be qualified as a political party hereunder, or given a place on a ballot, which organization or group is associated, directly or indirectly, with Communist, Fascist, Nazi or other un-American principles and engages in activities or propaganda designed to teach subservience to the political principles and ideals of foreign nations or the overthrow by violence of the established constitutional form of government of the United States and the State of Illinois.

A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an "established polical party" as to the State and as to any district or political subdivision thereof.

A political party which, at the last election in any congressional district, legislative district, county, township, school district, park district, municipality or other district or political subdivision of the State, polled more than 5% of the entire vote cast within such congressional district, legislative district, county, township, school district, park district, municipality, or political subdivision of the State, where such district, political subdivision or municipality, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area of such district, political subdivision or municipality, is hereby declared to be an "established political party" within the meaning of this Article as to such district, political subdivision or municipality.

Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the State Board of Elections a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. Any such petition for the formation of a new political party throughout the State, or in any such district or political subdivision, as the case may be, shall declare as concisely as may be the intention of the signers thereof to form such new political party in the State, or in such district or political subdivision; shall state in not more than 5 words the name of such new political party; shall contain a complete list of candidates of such party for all offices to be filled in the State, or such district or political subdivision as the case may be, at the next ensuing election then to be held; and, if such new political party shall be formed for the entire State, shall be signed by not less than 25,000 qualified voters: Provided, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures. If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.

The filing of such petition shall constitute the political group a new political party, for the purpose only of placing upon the ballot at such next ensuing elec-

tion such list of party candidates for offices to be voted for throughout the State, or for offices to be voted for in such district or political subdivision less than the State, as the case may be, under the name of and as the candidates of such new political party.

If, at such ensuing election, the new political party's candidate for Governor shall receive more than 5% of the entire votes cast for Governor, then such new political party shall become an "established political party" as to the State and as to every district or political subdivision thereof. If, at such ensuing election, the other candidates of the new political party, or any other candidate or candidates of the new political party shall receive more than 5% of all the votes cast for the office or offices for which they were candidates at such election, in the State, or in any district or political subdivision of the State, as the case may be, then and in that event, such new political party shall become an "established political party" within the State or within such district or political subdivision less than the State, as the case may be, in which such candidate or candidates received more than 5% of the votes cast for the office or offices for which they were candidates. It shall thereafter nominate its candidates for public offices to be filled in the State, or such district or political subdivision of the State, as the case may be, under the provisions of the laws regulating the nomination of candidates of established political parties at primary elections and political party conventions, as now or hereafter in force.

A political party which continues to receive for its candidate for Governor more than 5% of the entire vote cast for Governor, shall remain an "established political party" as to the State and as to every district or political subdivision thereof. But if the political party's candidate for Governor fails to receive more than 5% of the entire vote cast for Governor, or if the political party does not nominate a candidate for Governor, the political party shall remain an "established political party" within the State or within

such district or political subdivision less than the State, as the case may be, only so long as, and only in those districts or political subdivisions in which, the candidates of that political party, or any candidate or candidates of that political party, continue to receive more than 5% of all the votes cast for the office or offices for which they were candidates at succeeding general elections within the State or within any district or political subdivision of the State, as the case may be.

Any such petition shall be filed at the same time and shall be subject to the same requirements and to the same provisions in respect to objections thereto and to any hearing or hearings upon such objections that are hereinafter in this Article 10 contained in regard to the nomination of any other candidate or candidates by petition. If any such new political party shall become an "established political party" in the manner herein provided, the candidate or candidates of such new political party nominated by the petition hereinabove referred to for such initial election, shall have power to select any such party committeeman or committeemen as shall be necessary for the creation of a provisional party organization and provisional managing committee or committees for such party within the State, or in any district or political subdivision in which the new political party has become established and the party committeeman or committeemen so seected shall constitute a provisional party organization for the new political party and shall have and exercise the powers conferred by law upon any party committeeman or committeemen to manage and control the affairs of such new political party until the next ensuing primary election at which the new political party shall be entitled to nominate and elect any party committeeman or committeemen in the State, or in such district or political subdivision under any parts of this Act relating to the organization of political parties. [Amended by Public Act 78-918, effective October 1, 1973.]

APPENDIX F

Chapter 46, Ill. Rev. Stat. (1975), Sec. 10-3

§ 10-3. Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures. Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political division, equaling not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political sub-division in which such district or political sub-division voted as a unit for the election of officers to serve its respective territorial area; Provided, that the maximum number of voters signing such petition may be increased to 25 whenever such amount is greater than the 8% limit hereinabove specified. For the first election following a redistricting of congressional districts, nomination papers for an independent candidate for congressman shall be signed by at least 5,000 qualified voters of the congressional district. For the first election following a redistricting of legislative districts, nomination papers for an independent candidate for State Senator or Representative in the General Assembly shall be signed by at least 3,000 qualified voters of the legislative district. Each voter signing a nomination paper shall add to his signature his place of residence, and each voter may subscribe to one nomination for such office to be filled, and no more: Provided that the name of any candidate whose name may appear in any other place upon the ballot shall not be so added by petition for the same office.

In the case of the offices of Governor and Lieutenant Governor a joint petition including one candidate for each of those offices must be filed.

Every petition for nomination of an independent candidate for any office for which candidates of established political parties are nominated by primary shall be filed at the time designated in Section 7-12 of this Act in regard to the nomination by primary of any other candidate for such office. [Amended by PA 79-1100, effective October 1, 1975.]

APPENDIX G

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ILLINOIS STATE BOARD OF ELECTIONS, Intervernor-Defendant Appellant, vs. GERALD ROSE, MELVIN JOHNSON, RICHARD LEEBOVE, U.S. LABOR PARTY, JOHN BROWN, and MITCHELL HIRSCH, Plaintiffs-Appellees.	No. 77-1475, 77-1476 (Consolidated) U.S.C.A. - 7th Circuit Received in Clerk's Office Jan. 5 - 1978 Thomas F. Strubbe Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Illinois State Board of Elections, Intervenor-Defendant Appellant above-named, hereby appeals to the Supreme Court of the United States from the final Order of the United States Court of Appeals for the Seventh Circuit entered in this action on December 9, 1977.

This appeal is taken pursuant to Title 28, United States Code, Section 1254(2).

DATED: January 5, 1978.

/s/ MICHAEL L. LEVINSON
/s/ MICHAEL E. LAVELLE
/s/ FRANKLIN J. LUNDING, JR.

Attorneys For Illinois State Board of Elections

100 N. LaSalle Street
Room 300
Chicago, Illinois 60602
(312) 435-6440